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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 738.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

ELIZABETH KERR, ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CAMDEN R. MCATEE,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 738.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

ELIZABETH KERR, ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINION BELOW.

The Opinion below (R. pp. 36-38) is reported in 122 F. (2) 638.

JURISDICTION.

The judgment below (R. p. 39) was entered June 30, 1941. The petition for rehearing, (R. pp. 39-40), filed July 15, 1941, was denied, (R. p. 46), August 11, 1941. The juris-

diction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Reference is made to the profert in the petition, (pp. 2-3, 12-13) from the World War Veterans Act, of Section 303 original, enacted June 7, 1924, and Section 303 amended, substituted therefor by its enactment on March 4, 1925. Their provisions and substance appear in the following Statement.

QUESTIONS PRESENTED.

Whether the statutory obligation of the United States, on April 5, 1940, to the estate of the insured for 184 contract installments under Section 303 as amended—"the present value of the monthly installments thereafter (after death of the surviving beneficiary) payable, said value to be computed as of the date of last payment under any existing award"—is $8,234, their present value in June, 1924, at the death of the beneficiary, or is $10,580 their present value in and after October, 1939, where it appears that all of said installments, and those applicable and payable to the designated beneficiary, had previously accrued in October, 1939, with liability therefor denied and payment refused from November 8, 1919, until December 4, 1939, and that there was an existing and payable judicial award to the estate of the beneficiary of the installments "payable and applicable" before his death, as also provided in Section 303 as amended.

The question merely involves adherence to the statute, and is not whether delay affects the computation as propounded in the petition.

STATEMENT.

Section 303 as amended,[1] of the World War Veterans Act, as amended, provides that, if the designated beneficiary of

[1] Act of March 3, 1925 (43 St. 1310; 38 U. S. C., Sec. 514).

a yearly renewable war term life insurance contract issued by the United States "survives the insured and dies prior to receiving all of the 240 installments, *or all such as are payable and applicable,* there shall be paid to the estate of the insured *the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment under any existing award.*"

The application of the quoted statutory provisions in determining the amount of the obligation of the United States to the estate of the insured is the issue herein where the United States always denied the contract was in effect at the death of insured on November 8, 1919, until the appellate court below held on December 4, 1939, that the contract was in effect in November, 1919.[2] As the 240 monthly installments due in November, 1919, and each month thereafter until all were accrued in October, 1939, were all unpaid, the trial court on April 5, 1940, gave the statute effect by its two separate judgment awards, *approved and entered by consent of the parties on said date,*[3] as the judicial liquidation of the claims made below to the contract proceeds, viz,—of $3,220, as the proceeds of the 56 contract installments due and payable but unpaid to the beneficiary before his death in June, 1924, for recovery by the estate of the beneficiary from the United States, and of $10,580, as the present value, either in October, 1939, or thereafter, of the 184 remaining contract installments payable after the death of the beneficiary, for recovery by the estate of the insured from the United States.

The judgment awards so entered were thereupon reviewed and found correct by the Bureau of War Risk Litigation, and accordingly were certified to the Veterans Administration for payment.[4]

Subsequently, on June 21, 1940, the United States moved in the trial court for amendment of the judgment award of $10,580 by its reduction to $8,234, which was alleged to

[2] R. p. 1.
[3] R. pp. 2-3.
[4] R. p. 8.

be the present value of the 184 installments in June, 1924, at the death of the beneficiary.[5] The motion alleges such award of only $8,234 was proper under an administrative practice and construction of Section 303 as amended that was not applied in computing the consent judgment award of $10,580 because of surprise, mistake, neglect or inadvertence.[6]

The parties stipulated that 184 installments were payable from July, 1924, through October, 1939, after the death of the designated beneficiary, and had a present value in June, 1924 of $8,234, and a present value in October, 1939, or thereafter, of $10,580.[7]

The parties, by controversial affidavits, disputed the existence or application of the administrative practice alleged in the motion.[8]

The trial court sustained the motion, and by its order of January 9, 1941,[9] amended its prior judgment award of $10,580 and reduced same to $8,227.50, (being $8,234 less $6.50, offset to the United States as payment of the unpaid grace month premium for November, 1919, which incidental recovery is not in issue herein). The estate of the beneficiary thereupon received from the Veterans Administration payment of its $3,220 judgment award.[10] The estate of insured appealed, and, on June 30, 1941, in the Court of Appeals below, obtained its judgment[11] with opinion,[12] reversing the reduction of the original judgment award from $10,580 to $8,234, (but subject to the premium offset).

The United States filed a petition for rehearing,[13] and therein sought to disclose the administrative practice was in conflict with the appellate opinion below, by exhibiting

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[5] R. p. 3.
[6] The motion was predicated upon F. R. C. P. 60 (b).
[7] R. p. 4.
[8] R. pp. 4-8.
[9] R. pp. 30-31.
[10] Pet. p. 4.
[11] R. p. 39.
[12] R. pp. 39-40.
[13] R. p. 39.

a letter from the Veterans Administrator.[14] Manifest errors in the letter were pointed out by the estate of insured.[15] The petition was overruled.[16] Thereupon, the present petition for writ of certiorari was filed and exhibits another letter of the Veterans Administrator,[17] equally inapplicable to the material question.

ARGUMENT.

I. Neither substance nor application to the present case is shown in the Errors Assigned or Reasons Stated in the petition as grounds for issue of the writ.

II. Precedents not adverted to below further justify the original award of $10,580.

I.

The first and second Reasons Assigned[18] are that the decision below directly opposes a long established and consistent administrative practice, and will impose burdensome financial and administrative consequences.

Such practice is stated that "All cases which have been adjudicated in favor of estates under Section 303 of the World War Veterans Act have been settled upon the basis of the present value of installments as of the date the insured's estate became entitled to receive payment, except as hereinafter explained."

Such administrative practice is not pertinent here. This case is not being adjudicated under Section 303. Its adjudication is admittedly under Section 303 as amended, under a later and a different statutory rule, which is held by this Court to have effected a radical change in the prior law.[19]

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[14] R. p. 41.
[15] R. pp. 42-46.
[16] R. p. 46.
[17] Pet. p. 14.
[18] Pet. pp. 5-6.
[19] *Singleton* v. *Cheek*, 284 U. S. 493, 496.

If it were adjudicable under Section 303, every installment payable after the death of the beneficiary would either be payable to Elizabeth Kerr, or to her and/or other permitted statutory beneficiaries in meagre payments until there was no survivor of the class, and only then would the present value of the installments be payable to the estate of the insured in a lump sum.[20]

Section 303 was repealed and Section 303 as amended, as a radical change in the prior law, was substituted in March, 1925.[21] Consequently, any administrative practice applicable to Section 303 fell away sixteen years years ago. There is no practice that properly may be set up in opposition to the appellate decision below.

As for the second Reason of administrative and financial burdens, the Administrator advises in his subsequent letter[22] that 58,953 cases have been adjudicated under Section 303 as amended in accordance with the above quoted administrative practice set forth in his earlier letter.

How cases declared adjudicated under Section 303 as amended, which the Administrator and petitioner insist is an exception to and hence outside of Section 303, were thereby adjudicated under the radically different provisions of repealed Section 303, or under its obsolete practice, requires another letter of explanation. At present it is evident, where 58,963 cases have been given administratively the benefits of Section 303 as amended, that the addition of this case to the group by its judicial adjudication below under Section 303 as amended, results in neither burdensome nor financial consequences.

The third Reason, alleging erroneous interpretation below of Section 303,[23] embodies departure again from Section 303 as amended in 1925 and substituted for original Section 303, and from other precedents. *Singleton* v. *Cheek*, and *White* v. *United States*, cited to establish Section 303 in

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[20, 21] Vide Section 303 original and Section 303 as amended in Petition Appendix (pp. 12-13), and *Singleton* v. *Cheek, supra.*

[22] Pet. p. 14.

[23] Pet. p. 7.

1924 became part of the insurance contract, make no reference to original Section 303, and, on the contrary, *Singleton* v. *Cheek*, after quoting Section 303 as amended in 1925, and setting forth an administrative award made in 1925 under Section 303 as amended, holds the amended section effected a radical change in the statute.[24] In other words, since Section 303 as amended has entirely superseded original Section 303 as a radical change of the statute, the exploration of Section 303 or its obsolete practice has no substantial or useful application to the present controversy.

The petition says the Court below[25] considered that Congress, in enacting original Section 303, intended the correlation of the obligation with the date of payment. This omits that the Court below gave consideration to Section 303 as amended as entirely controlling.[26] The statement that Section 303 as amended was represented to and accepted by Congress as limited in its application to awards in course of payment at the passage of the Act of 1924 is contradicted by its provisions, by the Committee reports and by the Administration recommendation of the amendment and its purposes.[27]

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[24] *Supra* note 19.

[25] Pet. p. 7.

[26] R. p. 37.

[27] Vet. Adm. Recommendation, R. p. 17; Cong. Comm. Rep., R. pp. 19-20. Also to the contrary:

R. p. 27—The Comptroller General in 1926 held award should be made under Section 303 as amended.

R. p. 21—The Veterans Commissioner advised the trial court:

"Section 303 as amended * * * was intended to supersede all prior legislation."

In *Singleton* v. *Cheek* (*supra*) as in this case, no administrative or other awards were made until long after the death of the designated beneficiary. In August, 1925, they were made, under Section 303 as amended, by the Administration. Whether the determination of present value was made therein after the death of the beneficiary as of the date of subsequent award and payment to his estate is not stated in the opinion, but that it was so made is the obvious requirement of Section 303 as amended.

These matters of record demonstrate any contention that the principles and practices under the original but repealed Section 303 remained applicable to all subsequent awards, is entirely without substance. The argument fails entirely since it is apparent this case remains posed in all its aspects, under Section 303 as amended.

The contention that the award of $10,580 requires the payment of interest[28] contrary to the rule that the liability must be "imposed by statute or assumed by contract" has no substance. Here the statute is part of the contract and intends its just payment. Therefore, any interest enveloped in the award is both imposed by statute and assumed by contract.

The contention that administrative construction is not shown to have been clearly erroneous and should therefore have effect[29] also is without substance; it is evident such construction fell away with the repeal of Section 303.

The Reasons being shown untenable, it is submitted the Errors rested upon them are likewise without substance.

II.

The original judgment award is justified by other precedents not adverted to, nor included in the reasoning of the opinion below.

By statutory provision, or otherwise, an original administrative controversy upon institution of action becomes a judicial controversy.[30] This has been expressly held by the Court below in reference to claims to veterans insurance contract proceeds, and that the resulting judgment is

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[28] Pet. p. 9.
[29] Pet. p. 10.
[30] *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 725.

forthwith payable from available funds.[31] It follows that the judgment award below to the estate of the beneficiary being forthwith payable is deemed paid, and that its date fixes and becomes the time for the statutory computation of the amount to be adjudged to the estate of the insured.[32]

In an other aspect, under specific decisions of this Court and administrative duties therein imposed or recognized, the judgment award for $10,580 is again sustained. Once the right to recover is established by judgment, the Administration will pay the subsequent installments to the persons entitled.[33] Upon determination, by the judgment of 1939, that the contract was effective, administrative awards to the estate of the beneficiary and to the estate of the insured would thereupon be possible, and the award to the estate of the insured would be for $10,580 under Section 303 as amended.[34] If only the judgment award to the estate of the beneficiary was made in October, 1939, or thereafter, the ensuing administrative award to the estate of the insured would again be $10,580.

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[31] *Hines* v. *United States*, 70 App. D. C. 206, 106 F. (2) 85:

> "Sec. 17 of Title I of the Act sets up a fund to pay insurance benefits provided for by Title III. Whenever there is a disagreement between the insured and Administrator concerning any insurance benefits which may be due under Title III, the Administrator is given the discretionary power by sec. 17 to determine the question, and, if his decision is favorable to the insured, to award and pay benefits from the fund. However, if the Administrator determines the question adversely to the insured, sec. 19 of Title I, 38 U. S. C. A. Par. 445, allows the insured to test the determination of the Administrator by proceeding in a district court of the United States. In the event the court decides in favor of the insured and enters judgment, the fund established by sec. 17 is available for the payment of the judgment. It will thus be seen that the discretion of the Administrator under Title III or sec. 17 of the Act is not conclusive, as sec. 19 provides for a judicial determination of the controversy."

[32] Maxim: What is implied is as effectual as what is expressed (86 U. S. 666).

[33] *United States* v. *Towery*, 306 U. S. 324, 331.

[34] Cf. *Singleton* v. *Cheek*, in Note 27 *supra*.

III.

Lack of error in the opinion and judgment be
of substance in the reasons submitted to supp
tion being both apparent, it should be denied.

Respectfully submitted,

CAMDEN R. McA
Attorney for

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ort the peti-

TEE,
Respondent.

BRIEF FOR THE RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 738

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

CITIZENS' LOAN & TRUST COMPANY, Administrator De Bonis Non of the Estate of JOSEPH KELLY KEBR, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1941

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THE UNITED STATES OF AMERICA, *Petitioner*,

v.

CITIZENS' LOAN & TRUST COMPANY, Administrator De Bonis Non of the Estate of JOSEPH KELLY KERR, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 36-38) is reported in 122 F. (2) 638, and was rendered on the second appeal of this case by the plaintiff below. The opinion on the first appeal, which also reversed the trial court, is reported in 108 F. (2) 585. The trial court rendered no opinion on either its first or second hearing of the case.

JURISDICTION.

Judgment (R. 39) was entered by the Court of Appeals on June 30, 1941. Petition for rehearing (R. 39-46) was

denied (R. 46) August 11, 1941. The Petition of Certiorari was filed November 10, 1941 and granted (R. 48) December 15, 1941. Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, under Section 303, World War Veterans' Act, 1924, as amended, the amount of the Government's obligation to the estate of an insured under a contract of yearly renewable term insurance is increased by delay in its payment.

STATUTE INVOLVED.

The part of the Section preceding the provisos is involved. Amended Section 303 of the World War Veterans' Act as enacted by Section 14 of the Act of March 4, 1925, c. 553, 43 Stat. 1302, 1310 (38 U. S. C. 514), provides as follows:

> "Sec. 14. Section 303 of the World War Veterans' Act, 1924, approved June 7, 1924, is hereby amended to read as follows:
>
> "Sec. 303. If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: *Provided*, That all awards of yearly renewable term insurance which are in course of payment on the date of the approval of this Act shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this Act. When any person to whom such insurance is now awarded dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remain-

ing unpaid monthly installments of the insurance so awarded to such person: *Provided further*, That no award of yearly renewable term insurance which has been made to the estate of a last surviving beneficiary shall be affected by this amendment: *Provided further*, That in cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917."

STATEMENT.

By a contract of yearly renewable term insurance the United States insured the life of Joseph Kelly Kerr, a soldier, in the principal sum of $10,000 (R. 1), providing for payment to his designated beneficiary, in case of his death, of $13,800 in 240 deferred monthly installments of $57.50 each as the equivalent of the principal sum created within the term upon the basis of interest at 3½ per cent per annum. Section 303 as amended in 1925, of the World War Veterans Act, governs the payment or recovery, by the estate of the insured, of the subsequent payable installments where a beneficiary survives insured, but dies before receiving the installments payable or applicable to his interest, by its provision in such case, which is the present case, that:

> " * * * there shall be paid to the estate of insured *the present value of the monthly installments thereafter payable, said value to be computed as of the date of last payment under any existing award.*"[1]

Upon the death of insured on November 8, 1919, and for more than twenty years thereafter, the United States denied the contract was in effect, and that it was liable on the insurance contract. This disagreement between the par-

[1] *White* v. *United States*, 270 U. S. 175; *Singleton* v. *Cheek*, 284 U. S. 493; *Pagel* v. *Pagel*, 291 U. S. 473; *McCulloch* v. *Smith*, 293 U. S. 228.

ties resulted in the present action and judicial controversy as to the liability until same was finally determined and adjudged by the United States Court of Appeals for the District of Columbia on December 4, 1939, in the first appeal by the estate of insured from the dismissal of the action by the judgment of the trial court. (R. 1)

Pursuant to this delayed appellate determination, with the estate of the beneficiary and estate of the insured duly before the Court as claimants under Section 303 as amended (R. 1), the trial court on April 5, 1940, entered certain judgment awards previously approved by the government attorney (R. 3).

Thereby (R. 2), recovery against the United States was awarded to the estate of the beneficiary in the sum of $3,220 as the total of 56 installments of $57.50 each applicable and payable but unpaid at the death of the surviving beneficiary on June 24, 1924, and this award is not in present controversy as after January 9, 1941, same was paid. Thereby (R. 2), further recovery was awarded to the estate of the insured in the sum of $10,580 as the amount of the 184 installments accrued in the contract term after the death of the beneficiary. This recovery is in controversy herein as to whether it is, or exceeds, the recovery of the present value of the contract installments payable after death of the beneficiary, by the estate of the insured, provided under section 303 as amended, and this is the sole issue. The entry of the judgment awards further recited that they totalled $13,800, which is the ultimate contract liability, and impressed each award with the attorney fee provided by law for payment therefrom (R. 2).

Thereupon, said judgments awarded were reviewed and certified as correct by the Bureau of War Risk Litigation of the Department of Justice to the Veterans Administration for payment. (R. 8.)

Instead of payment, alleging mistake and inadvertence[2] in their entry, the United States moved the trial court on

[2] The motion was made pursuant to F. R. C. P. No. 60(b).

June 21, 1940, to restate the $3,220 award to the estate of the beneficiary, and to reduce the $10,580 award to the estate of insured to $8,227.50. The mistake and inadvertence subsequently alleged was the failure to call the attention of the tral court to the Administration practice of limiting *the payment of installments of insurance benefits following the death of insured and the death of the designated beneficiary to the commuted value of such installments as of the date of death of the designated beneficiary, rather than the full installments as they have otherwise matured, and regardless of the date of any judgment or award of recovery of such insurance;*[3] also, the failure in the judgment award to set off, against $8,234, alleged in the motion as the present value of the installments at the death of the beneficiary, the $6.50 premium for the grace month of November, 1919, in which the contract matured. The motion only stated the judgment award of $10,580 was contrary to the provisions of Section 303 as amended in that it provided for recovery of contract installments totalling $10,580, instead of their present value (R. 4).

For purposes of the motion, the parties stipulated (R. 4) the present value of the 184 installments payable after the death of the beneficiary was $8,234 at his death and was $10,580 in October 1939, at the end of the contract term, and thereafter, thereby establishing the judgment award of $10,580, as the total of the installments accrued in the contract term, afforded relief identical with a judgment award of $10,580, as their present value at the end of the term, or thereafter. The parties filed controversial affidavits concerning the administrative practice. (R. 4, 7.)

The payment of both judgment awards was delayed by the motion. On January 9, 1941, the trial court entered its order confirming the $3,220 judgment award as correct

[3] This ground appeared first in the affidavit (R. 4) filed *nunc pro tunc* as of June 21, 1940, on January 9, 1941, and, as italicized, is quoted therefrom.

and unaffected by the motion, and its payment followed. By further order of the same date, the trial court reduced its original $10,580 judgment award to $8,227.50, thereby sustaining the government motion, and the estate of the insured appealed therefrom. Upon its reversal by the appellate court, excepting as to the premium offset, and after petition for rehearing was overruled, petition for certiorari duly filed has now been granted. The death of Mrs. Kerr, after the last appellate decision resulted in the substitution of parties.

Having before it the statutory computation of "*present value of the monthly installments*" payable after death of the beneficiary, "*to be computed as of the date of last payment under any existing award,*" the appellate court also had the facts that all the contract installments were accrued and unpaid in the contract term, that judgment award of those payable to the estate of the beneficiary had been made by the trial court, and that the present value of the installments payable after the death of the beneficiary equalled their total amount at the time of the award to the estate of the beneficiary. It also had its own decisions that, after disagreement and institution of action on an insurance contract, judicial control supersedes administrative function, and that judicial insurance awards of the Veterans Administration are forthwith payable with funds available.[4]

The appellate court passed by, in its opinion, these matters of fact and law, which reasonably sustain a conclusion that the beneficiary judicial award herein amounted to its payment, and established the accompanying judicial award to the estate of insured of the total of the overdue installments as their present value.

Instead, the appellate court, while accepting the government contention that Section 303 as amended merely amended original Section 303 to resolve problems in a new class of cases, nevertheless, (R. 37) applied Section 303 as amended, on the ground that the same method of com-

[4] *United States, ex rel Marsh* v. *Hines*, 70 App. D. C. 206, 106 F. (2) 185. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 725.

putation provided in both sections was intended to give the estate of insured full use of the money to which it was entitled but never had. Adherence to one conception of a controversy is not material error unless another conception leading to the same result is also equally in error.

SUMMARY OF ARGUMENT.

The errors, assigned as arising in the appellate court decision, (Pet. Br. p. 8) are briefly that literal application of Section 303 as amended does not justify the $10,580 award, and is not justified by delayed payment of present value; that application of Section 303 as amended effects the allowance of interest upon a past due obligation and overturns a justifiable administrative practice. The errors summarize into determination of what is the present value liability upon a government obligation where its payment was delayed by the government.

The controversy here is not under original Section 303 as laid by the government in Point I of its argument (p. 10). Superseding that original section, is Section 303 as amended, to the application of which, delay in payment is no objection.

The original award herein does not include interest contrary to the rule of the *Worley* case.

There is no prior administrative practice applicable to this case, and hence none overturned herein.

The case portends a reexamination by the court of its previous decisions in government insurance contract cases.

ARGUMENT.

The issue is merely the amount payable in discharge of the principal of the contract obligation that is overdue because the government delayed its payment. The contract obligation here is 184 monthly installments due and payable as such in the term beginning in July, 1924, and entirely accrued and unpaid at end of the term in October, 1939, in their total principal amount of $10,580. Subsequent to the end of the contract term, it is to be discharged by pay-

ment of the present value of the total of the installments. The controversy is whether the amount payable is $8,234, their present value in July 1924, or $10,580, their present value at the end of the term and thereafter. (R. 4.) No allowance of interest upon any installment or upon the lump sum present value is involved.

I. Whether there is legislative authority for increasing the amount payable because of delay in payment.

In seeking to place the controversy under original Section 303, on the ground that Section 303 as amended applies only to computation of the present value in a single class of cases, the government ignores that it effected the entire abandonment of original Section 303 by procuring Section 303 as amended in 1925. The gist of the contention is that original Section 303 authorized the computation and payment of installments, of present value as of the date of death of the beneficiary, regardless of when paid; that the administrative practice of doing this continued because Section 303 as amended only created a new rule applicable, and thereafter applied (Pet. Br. p. 13) where commutation was made in liquidation of a prior existing installment award previously made under Section 14 of the 1919 Act, or under Section 407 of the 1921 Act. In other words again, while admitting the present case arises under Section 303 as amended, the government urges the new rule is inapplicable here only because the present case evidently does not involve the commutation of a previous installment award to the estate of an insured.

To resolve the contention it is not necessary to prove the administrative practice wrong that prevailed under original Section 303. It is only necessary to establish that Section 303 as amended entirely superseded original Section 303, and demanded application of a new practice which rendered the previous practice obsolete; if so, the new rule applies to this and all other cases arising under Section 303 as amended. It is only necessary to establish the present case,

admittedly arising under Section 303 as amended, lies actually or substantially under the new practice admittedly required by Section 303 as amended.

Before the enactment of original Section 303 in 1924, the provisions of law for the distribution or payment of the further installments were as follows: To the estate of insured, if no person in the permitted class survived him (Sec. 14, Act of 1919) (Pet. Br. p. 25) (Sec. 407, Act of 1921) (Idem, p. 26), or, in case of such survivor, to the person awarded, until his death or incapacity within the contract term, and, thereupon, to the permitted person or persons entitled under state intestacy laws, and upon exhaustion of the class by death within the term, to the estate of the last surviving person (Section 15, Act of 1919) (Idem, p. 24).

The World War Veterans' Act of 1924 (Sec. 602, 38 U. S. C. 571) in repealing the prior Acts, provided its enactment should not affect any Act done or liability accrued, or any suit previously commenced, and that all such rights and liabilities should continue and be enforcible as if repeal had not been made.

In original Section 303 enacted as part of the World War Veterans Act of 1924, the distribution or payment of further installments as provided was this: To the estate of insured in the amount of their present value, if no person within the permitted class designated as a beneficiary survived him, or if no person within the permitted class was surviving upon the death of the beneficiary during the contract term (Idem, p. 26).

Original Section 303 thus made no provision for cases where persons of the permitted class survived a beneficiary, and became entitled to contract proceeds in course of payment before its enactment. Consequently, the Administration was confronted with these problems, with the necessity of establishing the insured or beneficiary was not survived, of making even minute monthly payments of an installment to various persons, and of requiring the estate of an insured to be held open and unsettled for twenty years or more.

To remove these difficulties, the Bureau showed them to the Congress (R. 17), rewrote Section 303 into new provisions as a substituted section, designed to overcome them, and obtained its enactment as Section 303 as amended in 1925. The record amply discloses the amendment was for no other reason, especially the Committee report, (R. 19) entitled to judicial notice.[5] The record also discloses Section 303 as amended was not obtained nor enacted to meet the *Cody* case, for it shows the Director on June 10, 1925, after its passage, had approved a ruling made therein as a proper application of original Section 303 to the case. (R. 36.)

In *Singleton* v. *Cheek*,[6] this Court holds a radical change and modification of the prior statutes was effected by Section 303 as amended. Thus, its enactment, its provisions and its judicial construction all establish Section 303 as amended as substituted entirely in place of original Section 303, and not as its amendment in an incidental way.

Section 303 as amended, thus, stands alone, and repealed original Section 303. It must be concluded provision for payment of the present value of the unpaid monthly installments merely facilitates its payment and does not curtail the contract amount due;[7] for no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress, and none could be given by any administrative regulation.[8]

Payment of present value is not an allowance of interest as part of the amount paid; the parties here agree it is a principal amount which if placed at interest will provide a fund for payment of certain future installments that will exhaust the fund when the last installment payment falls

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[5] *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 464.

[6] 284 U. S. 493, 496.

[7] Cf. Veteran Commissioner report (R. 24); also his conclusion (R. 21): "Section 303 as amended was intended to supersede all prior legislation."

[8] *Lynch* v. *United States*, 292 U. S. 571, 578.

due and is paid.[9] It follows for decision that if no installment was ever paid, its present value is at least the sum of all of them, the amount of the fund when the last installment was due and unpaid.

These propositions that Section 303 as amended stands alone as a radical change of the prior law; that provision for payment of present value entails no curtailment of the amount due by Congress and that present value at the end of the contract term is the sum of the accrued but unpaid installments appear fully to answer the government contentions that there is no legislative authority for payment of actual present value where prevented by government delay, and are so submitted.

The government contentions are submitted not to make erroneous the appellate court reasoning or conclusions. So far as the statutory present value is declared computable *"as of date of last payment under any existing award"*, the appellate court notes herein there was a judicial award to the estate of the beneficiary, but no last payment under any existing award. This omits consideration that in *Hines* v. *United States*,[10] the appellate court held that action on an insurance contract removes its determination from administrative entirely into judicial controversy; that a judgment in favor of an insured is forthwith payable from a fund available to the Veterans Administration, and that nothing short of an action to establish a set-off, if ordered by the Comptroller General, but not accepted by claimant, justifies withholding money adjudged payable by the government. It follows, the $3,220 judicial award, as forthwith payable, was substantially on April 5, 1940, a last payment under an existing award, and that "last existing award", in Section 303 as amended, does not singly embrace only an administrative award.

The appellate court (R. 37) further construes the statutory phrase as providing for determination of present value

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[9] Summary of note 10 (Pet. Br. p. 11).

[10] 70 App. D. C. 206, 209, 212, 106 F. (2) 185; Sec. 442, Title 38, U. S. C. A.; c. 863, 1, 2, 46 St. 1016.

as of the last installment payment on the ground that any previous determination assumes a use of money that was never had, and finally rests its decision on the sound result of the case.

II. The award of the amount of the installments as their present value payable at the end of the contract term does not include interest on a past due government obligation contrary to the Worley case rule.

Point II by the government is that the $10,580 award includes interest on a past due obligation contrary to the *Worley* case rule. The simple answer is the rule states the non-liability is subject to the exception arising where the liability is imposed by statute or assumed by contract. Herein the liability arises in each aspect, and interest is not claimed on any past due installment nor on the present value award.

As a side-light on this contention of interest, let it be assumed a unit of $10,000 in the existing administrative fund has stood as a contingent reserve since November 8, 1919, to provide at 3½ per cent a year a fund sufficient to exhaust the fund by payment of 240 monthly contract installments through October 8, 1939, and that no installment has ever been paid. On April 5, 1940, when $3,220 was awarded and payable, as the 56 installments due until and on June 8, 1924, the material government profit in the ensuing 16 year interval is self-evident upon the unit-part underlying that delayed obligation. Its profit on the unit-part underlying the additional 184 installments accrued and unpaid from November, 1919, to June, 1924, is again evident, as well as its profit thereon from June, 1924, until the present time. These profits arise because the initial unit-parts have stood at interest unreduced by any intended withdrawal of either principal or interest in the ensuing 20 years or more. The conclusion must be the government has profited from its delay because its certain ultimate obligation is only $13,800, which it would have had in hand and paid

progressively through the term if the contemplated installment payments were duly made.

III. No existing and applicable administrative practice is overturned herein by the appellate decision.

Point III, that a consistent long continued administrative practice has been overturned without cogent reason by the appellate court, is rested on three grounds. First, that the practice has consistently prevailed since the enactment of original Section 303 in 1924 in the adjudication of more than 50,000 cases, is entitled to great weight, and is not to be overturned except for the most cogent reasons. Second, that Congress enacted Section 303 as amended to apply to one class of cases, and having taken no action contrary to the application of the administrative practice to the 50,000 cases adjudicated since the amendment in 1925, has approved the administrative construction given in the *Cody* case. Third, that no previous contention has arisen in seventeen years that the construction is erroneous. Each is without substance.

The government brief does not precisely state the administrative practice allegedly overturned. The motion for correction of the $10,580 judgment award (R. 3) does not state or rely on the practice. The supporting affidavit, (R. 4) filed six months after the Veterans Commissioner report, states it is the limitation of the payment of installments payable after death of a beneficiary to their commuted value calculated as of the date of death of the beneficiary rather than the full installments as they may have otherwise matured regardless of the date of any judgment or award of recovery of such insurance. The Veterans Commissioner report (R. 25) only states an administrative construction of Section 303 as amended. The appellate court does not refer to it. The petition for rehearing refers to the practice as stated in the accompanying letter (R. 42) of the Veterans Administrator; his statement of the practice is quoted in the petition (p. 6):

> "All cases which have been adjudicated in favor of estates of insureds under Section 303, World War Veterans' Act, have been settled upon the basis of the present value of installments as of the date of insured's estate became entitled to receive payment, except as hereinafter explained. Moreover, no judgment presented to the Veterans' Administration for payment has ever embodied any contrary interpretation."

The petition relegates his "hereafter explained" to a foot note summary to the effect that the exception is the result of Section 303 as amended, said to be obviously inapplicable to the instant case.

The petition also exhibits a supplementary letter from the Veterans Administrator that 58,963 cases have been adjudicated under Section 303 as amended since its enactment in 1925 and through the 1941 fiscal year. That this administrative practice of such important application has never been expressed officially, in an established regulation or ruling[11] is inferable from the industrious secondary effort made herein to give it existence. That very effort discloses its own futility.

From such effort, the indefiniteness and uncertainty of the administrative practice is evident. As stated in the supporting affidavit it must apply to Section 303 as amended, which the motion alleges contravenes the award of $10,580, the admitted recoverable present value at the end of the contract term. As derived from the exhibit letters from the Veterans Administrator, the practice is limited in the first letter to cases adjudicated under original Section 303 as only one class of cases is exceptionally adjudicated under Section 303 as amended; yet the second letter says expressly that 58,963 cases have adjudicated in 17 years under Section 303 as amended. The specific reference in the first letter to the great number of cases adjudicated in 17 years under the administrative practice allegedly based on orig-

[11] Sec. 426, Title 38, U. S. C. A.; c. 320, 5, 43 St. 608; authorizing rules and regulations.

inal Section 303, and at variance with the appellate decision, is thus modified by the second letter into their special adjudication under Section 303 as amended.[12]

The only definite special adjudication proffered out of the 58,963 cases, is the administrative *Cody* decision in which further installment payments due thereafter under an award to the estate of insured were commuted into present value as of the date of the last installment payment, pursuant to Section 303 amended, said specifically by the government (p. 13) to apply only to that case.

Yet in *Singleton* v. *Cheek*, after the deaths of insured in March, 1921, and of his beneficiary in March, 1923, awards were later made to each estate on August 18, 1925, and paid in lump sums; the administrator of the estate of insured was officially advised the award of commuted present lump sum value was pursuant to Section 303 as amended.[13] Again, in *Hatch* v. *United States*,[14] the Veteran Commissioner (R. 21) states upon termination in November, 1925, of installment payments under awards made in 1919 to persons in being, the Bureau ruled the commuted value of the remaining installments was payable to the estate of insured under Section 303 as amended. Either of these cases entirely refutes the contention here proposed that Section 303 as amended was intended only to liquidate the commutation of installments awarded in payment to the estate of an insured.

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[12] Further material error in the first Veteran Administrator letter is disclosed by the Objections to the Petition for Rehearing (R. 43).

[13] This advice appears in the case record but not in the opinion. *United States* v. *Towery*, 306 U. S. 324, 332, notes that the Administration holds a judgment requires, without further claim, the payment of further installments; if on or after the judicial determination of liability herein in December, 1939, administrative awards were made, it is submitted this case and the *Singleton* case would be identical. In *McCulloch* v. *Smith*, 293 U. S. 228, this Court holds Section 303 as amended expressly applicable to an administrative award to the estate of insured, where same and beneficiary awards were made n 1932 or thereafter on a contract effective in 1919 and unpaid to the one beneficiary who died in 1926, and the other who died in 1932.

[14] 29 F. (2) 213.

It follows the alleged prevailing practice has no substance, as prevailing or as legislatively sanctioned, and that previous contention about the practice could not arise since it appears first devised as an obstacle herein.

IV. The wider portents of the case.

Lastly, this case has a wider aspect. It is that Elizabeth Kerr, mother of insured, as the only surviving person within the permitted class, became entitled to the installments payable upon the death on June 24, 1924, of her husband, Eugene Kerr, the designated beneficiary. It was so provided in original Section 303 of the 1924 Act, and in section 15 of the 1919 Act, and Section 602 of the 1924 Act preserved any right vested under prior acts.[15] Her action, instituted in her individual capacity, was modified into claims of the estate of the beneficiary and of the estate of insured by reason of the *White* decision,[16] approved in subsequent decisions that Congress might create new contract conditions in a contract not entered into for gain, and whereby her vested beneficial right was annulled by Section 303 as amended.

Now in *Lynch* v. *United States*,[17] the insurance contracts, though not entered into for gain, are declared legal obligations that create vested rights and are of the same dignity and with the same legal incidents as other contracts of the United States. Admitting the contract is subject to all amendments of the original law, and for example to Section 303 as amended deemed by its provision retroactively in effect as of October 6, 1917, the date of the original law, its construction is submitted to be as follows. The veteran while living has an executory contract subject to change by legislation, except as to the amount of benefits, on the theory

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[15] *Hatch* v. *United States*, 29 F. (2) 213.

[16] 270 U. S. 175.

[17] 292 U. S. 571.

that he may by beneficiary designations obviate the changes, and that his failure to do so is his acceptance of the amendment. Upon his death, when the contract is executed, the resulting vested rights cannot be legislated away. If so, Mrs. Kerr, in her individual right was entitled to installments totalling $10,580 as she survived the contract term. Payment of the same amount as the admitted present value of the installments at the end of the contract term is but plain justice, although partial in view of her death, if her vested right, put aside by the *White* decision is restored by the *Lynch* decision. Pouring vested rights afterwards into the estate of the insured is not justified by administrative exigencies regarding their execution, and in this sense the case lights the way to new determinations upholding them.

CONCLUSION.

It is submitted the decision of the appellate court should be affirmed.

Respectfully submitted,

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